IN THE MISSOURI SUPREME COURT

SUPREME COURT CASE NO. 86412

STATE OF MISSOURI, ex rel. DIANA GOLDEN,
Relator,

vs.

THE HONORABLE WILLIAM C. CRAWFORD,
Respondent

ORIGINAL PROCEEDING IN PROHIBITION

RELATOR'S REPLY BRIEF

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Motion to Strike Respondent's "Statement of Facts"

Rule 84.04(f) permits respondent to include a statement of facts when respondent is dissatisfied with the accuracy or completeness of relator's statement of facts. Respondent abuses the rule, showering the court with an additional 14 pages of unessential factual claims—only intermittently cited to the record—and argument. Such argument asserted as fact is not relevant to the issues before the court, but is intended only to generate sympathy that will bias the court on the legal issues that are before the court. Respondent's actions force relator to choose between further burdening the court, and simply tolerating this abuse of the rule. Relator respectfully moves the court to strike respondent's statement of facts.

Argument

Point I

I. Relator is entitled to an order prohibiting respondent from taking any action other than granting relator's motion for summary judgment, because relator is immune from suit under the official immunity doctrine, in that she is a public employee and her actions in response to the subject 911 call were discretionary acts.

A. Propriety of prohibition & standards for granting the writ

In suggestions in opposition to the writ petition respondent argued that prohibition does not lie to correct an erroneous denial of summary judgment and that neither summary judgment nor prohibition based on official immunity is proper. Having failed to address the issue in his brief on the merits, respondent now apparently concedes that prohibition is an appropriate remedy.

B. The official immunity doctrine—"public employee" vs. "public officer"

This court handed down its decision in *State ex rel. Howenstein v. Roper*, 2005 WL 351374 (Mo. banc February 15, 2005) just two days before relator's brief was filed. Respondent cites language from that case in arguing that while Golden is a public employee, she is not a "public officer" entitled to immunity. Respondent argues that relator misreads *State ex rel. Missouri Dept. of*

Agriculture v. McHenry, 687 S.W.2d 178, 183 (Mo. banc 1985), which rejects the assertion that a "mere employee" is not entitled to official immunity. Contrary to respondent's assertion, relator doesn't contend that all public employees are automatically entitled to official immunity—only that the doctrine isn't limited to high officials or supervisory employees. Respondent appears to believe just that, reading into *Howenstein* a departure from past Missouri cases that just is not there.

In *Howenstein*, this court described a public officer as "an individual invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." From this language respondent leaps into a discussion of job levels, concluding that an employee in an "entry-level" job without supervisory functions cannot be a public officer. Respondent's reading of the case would place *Howenstein* squarely at odds with other cases that emphatically reject the idea that job level determines the availability of immunity. *See Brummitt v. Springer,* 918 S.W.2d 909, 912 (Mo. App. S.D. 1996); *Green v. Denison,* 738 S.W.2d 861 (Mo. banc 1987); *and Sherrill v. Wilson,* (653 S.W.2d 661 (Mo. banc 1983).

The key is not job level, but whether the job involves discretion in the performance of a governmental function. In *Sherrill*, the Supreme Court stated that the Court of Appeals' "willingness to apply the rules [of official immunity] to those in supervisory positions…did not go far enough with the principle." In *Green*, the court was even more emphatic: "We reject any suggestion that only

higher officials possess the discretion or judgment so as to enjoy the protection of official immunity." *Green*, at 865.

There is no more sovereign function of the government than to provide police powers for public safety. As a 911 operator, Golden was performing a quintessential governmental function as the gateway to all emergency services. How one classifies her "job level" is irrelevant.

C. Section 190.307 does not supersede official immunity.

Respondent all but abandons the argument that §190.307 takes away official immunity and public duty, barely mentioning the issue in a single paragraph. (Resp. Br. at 41-42). Relator relies on the arguments and authority set forth in the opening brief at pages 14-19 and 26-27.

D. Plaintiff's search for a ministerial duty

Respondent does not dispute that this court's prior cases divide a public official's duties into two categories: discretionary and ministerial. Nor does respondent dispute that a suit can proceed only if it is a ministerial duty that the defendant is alleged to have violated. Rather, respondent argues that Golden's allegedly negligent conduct violated a ministerial duty—one that is statutory or department-mandated, where the manner of performance is prescribed and all discretion is removed. But after lengthy argument—including in respondent's

statement of facts—the specific legal or departmental rule that Golden supposedly violated remains a mystery.[1]

For that missing rule, respondent attempts to substitute deposition testimony—without citation—in which "Golden and her supervisor admitted that Golden was required to *transmit* accurate information" and "Golden herself admitted that she had no discretion in that regard." (emphasis added) (Resp. Br. at 24). Two problems: First, that wasn't Golden's testimony.[2] Second, the missing ministerial duty is still not revealed to the court. Asking Golden and her supervisor whether she was required to record or transmit information accurately is like asking a police officer whether he is required to only arrest people guilty

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[1] Respondent continues to assert that a ministerial duty can be found in §1.11 ¶4 of the P&P Manual and NFPA 1061. But "DON'T ASSUME" doesn't prescribe conduct and NFPA 1061 wasn't a department-mandated rule. (see Rel. Br. at 19-24).

[2] This is the only mention of discretion in Golden's deposition:

> Q. *Taking down* the location of somebody in a 911 call is something about which there isn't any discretion is there? In other words, your job is to take it down accurately isn't it? (emphasis added)
>
> A. Yes.
>
> (Ex. F5 at 211 [page 24, line 3-8]).

of committing a crime. Of course that is the goal. The question is *how* the goal of accuracy is pursued and whether some rule takes away all discretion in how to achieve that goal. In the context of this case the issue here is not whether Golden should have checked a map before entering "to the west," but rather whether some rule mandated that she do so. Respondent has not cited—and cannot cite—such a rule.

Point II

II. Relator is entitled to an order prohibiting respondent from taking any action other than granting relator's motion for summary judgment, because under the public duty doctrine relator owed no duty to the decedent, in that relator's duties in responding to 911 calls are owed to the public at large and not privately to individuals in need of assistance.

A. Propriety of prohibition & standards for issuing the writ

Again, respondent apparently now concedes that prohibition is an appropriate remedy.

B. Missouri's public duty doctrine

Respondent does not dispute relator's basic statement of the rule.

C. §190.307 does not eliminate the public duty doctrine.

Again, respondent makes no detailed argument on this point; relator relies on the arguments and authority set forth in the opening brief at pages 14-19 and 26-27.

D. Diana Golden had no private duty to Wesley Love.

Respondent completely misreads Missouri precedent, remarkably concluding, "[I]f the public employee is performing a ministerial task then the employee does not come within the protection of the public duty doctrine." This actually states the practical converse of Missouri law. In *Jungerman v. City of Raytown,* 925 S.W.2d 202 (Mo. banc 1996) this court stated, "[b]y the public duty doctrine, a public employee is not civilly liable—even for breach of a ministerial duty—if that duty is owed to the general public rather than to a particular individual." Because the doctrine is so closely related to official immunity, most cases decided on the basis of public duty involve violations of ministerial duties for which official immunity is unavailable.

Respondent's misreading of the law appears to come from language in *Brown v. Tate,* 888 S.W.2d 413 (Mo. App. W.D. 1994), which says that official immunity and public duty "merge" and "produce the same result." This apparently leads respondent to conclude that public duty and official immunity are really the same thing. This is apparent because the cases respondent relies on don't raise public duty as an issue, but deal only with official immunity. *See*

Larabee v. City of Kansas City, 697 S.W.2d 177 (Mo. App. W.D. 1985) and *State ex. rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761 (Mo. App. E.D. 1981).

Respondent cites *Stacy v. Truman Medical Center*, 836 S.W.2d 911 (Mo. banc 1992). While the court observed that the hospital created an individual duty upon its acceptance of each patient, the decision is based on the determination that public duty did not apply because Truman was not a public entity and its employees were not public employees. Respondent also cites *Geiger v. Bowersox*, 974 S.W.2d 513 (Mo. App. E.D. 1998), which is distinguishable from the present case in that it involved a duty—the administration of medication to inmates—in which only the individual inmate involved had any interest.

Golden's duties, on the other hand are potentially owed to anyone and everyone. As a 911 operator she plays an integral part in the delivery of emergency services to the public at large. Like a police officer or firefighter, her actions will frequently impact individual members of the public, but Missouri courts have never found an individual duty in tort based on that fact.

E. Other states apply the public duty doctrine to 911 employees.

Respondent cites several cases from other states regarding 911 and public duty. Each case is inconsistent with settled Missouri law. Respondent cites *DeLong v. County of Erie*, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983). But that case was decided based on New York's "special duty"

exception, an exception that this court has repeatedly declined to recognize. (see Rel. Br. at 30). Under the exception, Erie County was found to have created a duty by giving the caller assurances on which the caller detrimentally relied. The court specifically distinguished situations where, as here, there is "no contact between the victim and the municipality." *Id.* at 615. *Chambers-Castanes v. King County*, 669 P.2d 451 (Wash. 1983) reached a similar result also based on a "special duty" exception and detrimental reliance by the caller.

Two other cases respondent cites are also unhelpful. *Hutcherson v. City of Phoenix*, 961 P.2d 449 (Ariz. 1998) involves 911, but doesn't discuss public duty since Arizona eliminated its public duty doctrine in *Ryan v. State*, 656 P.2d 597 (Ariz. banc 1982). Another case cited by respondent, *City of Kotzebue v. McLean*, 702 P.2d 1309 (Alaska 1985), followed *Ryan* in eliminating public duty altogether.

Finally, respondent urges this court to follow the unreported opinion of a Virginia trial judge in *Meeks v. Broschinski*, 63 Va. Cir. 150, 2003 WL 22415285 (2003). *Muthukumarana v. Montgomery County,* 805 A.2d 372 (Md. 2002), cited in relator's brief, was distinguished because in *Meeks*, unlike either this case or the Maryland case, the 911 operator ignored the call and never dispatched *any* response. *Meeks* is an example of the old adage that bad facts make bad law. The trial judge's opinion effectively eviscerates Virginia's public duty doctrine, including any "special duty" exception by rejecting detrimental reliance as a requirement. If *Meeks* reflects Virginia law then no 911 operator

there would ever be protected by public duty. The court should follow settled principles of Missouri law and the leading case from Maryland's highest court and recognize that Golden's duty is to the public at large.

Point III

III. Relator is entitled to an order prohibiting respondent from taking any action other than granting relator's motion for summary judgment, because relator is entitled to judgment as a matter of law under §190.307 RSMo, in that plaintiff has failed to plead—or place in genuine dispute—acts or omissions by relator that constitute willful and wanton misconduct or gross negligence.

A. Standard for granting the writ.

Respondent does not dispute the standards offered by relator for granting the writ.

B. Section 190.307.1 protects Diana Golden.

-and-

C. Section 190.307.2 protects Diana Golden.

Respondent argues that neither subsection of §190.307 applies to Golden. Respondent concedes that Joplin is a public agency and that Golden is a Joplin employee. Respondent further concedes that the Jasper County system for which

Joplin has contracted to provide services is required by and established under chapter 190. And respondent doesn't dispute the existence of the contract between Joplin and JCESB—the board set up by Jasper County—by which Joplin partially administers the Jasper County system.

Nonetheless, respondent argues that Golden is unprotected by §190.307 because she doesn't work in a system required by or established under chapter 190. Respondent's unstated premise is that only those directly employed by the governing body that imposes the tax—Jasper County in this case—are covered by §190.307.

That premise is false. First, §190.315 explicitly authorizes the governing body to "contract and cooperate with any public agency…for the administration of emergency telephone service." Section 190.307.1 covers employees of "any public agency" operating "any plan or system" required by §§190.300 to 190.340. Subsection 190.307.2 regarding the giving of emergency instructions covers an even broader group: any "person," which—by virtue of a governing body's authority under §190.315 to contract with "any association or corporation"—includes even private employees. Section 190.307 clearly covers employees of contracting public agencies and not just employees that work directly for the governing body that imposes the tax.

D. Plaintiff hasn't pleaded wanton and willful misconduct or presented any evidence of facts that would support a finding of wanton and willful misconduct.

Respondent apparently concedes that Golden did not engage in wanton and willful misconduct.

E. Plaintiff hasn't pleaded gross negligence or presented any evidence that would support a finding of gross negligence.

1. Gross negligence in general.

Respondent argues at length that Golden's conduct was grossly negligent. Unable to dispute what Golden's conduct actually was, respondent seeks to place that conduct in a bad light by mischaracterizing her prior performance evaluations. Without citation to the record, respondent states that Golden "had been warned on her evaluations…that she had a deficit in her knowledge of the city's streets." (Resp. Br. at 38.) This reference could only be based on her January 2001 performance evaluation—her first after being hired in September 2000—in which her supervisor complimented her progress on learning of the city streets, and simply observed that she could still improve—not surprising after such a short time on the job. (Ex. F4 at 191 [Luttrell dep. at 19-20]). This is Golden's supervisor's only reference to Golden's knowledge of the streets even though plaintiff's counsel had copies of four subsequent evaluations from March 2001 to March 2002, the time of the accident. (Ex. F4 at 191, 194). If those

evaluations had contained any "warnings" about Golden's knowledge of the streets, counsel surely would have asked her supervisor about them as well.

This case is not about determining what Golden did. The undisputed facts are that she gave the correct intersection but incorrectly added the "to the west" without checking a map. Plaintiff apparently hopes the court will view that conduct as grossly negligent based on plaintiff's record-spinning implication that Golden had a chronic problem with knowledge of the streets. The case is about what the term "gross negligence" means and whether a jury could find Golden's undisputed conduct so egregious as to violate that standard—questions for the court. Interpreting the term consistent with Missouri precedent, Golden's conduct was not grossly negligent. (see Rel. Br. at 35-39).

2. Increased "degrees of duty."

Respondent argues that Golden's "degree of duty" is increased because the caller informed her that the subject was apparently incapacitated, citing *Daniels v. Senior Care*, 21 S.W.3d 133, 137 (Mo.App. S.D. 2000). In *Daniels*, defendant was the caretaker of an elderly person suffering from dementia, who was killed in a fire. The defendant had either created the fire hazard or allowed the victim to create the hazard while under the defendant's care. Diana Golden certainly had nothing to do with Wesley Love ending up in the street in the middle of the night. *Daniels* is irrelevant to the question of what constitutes gross negligence under the statute.

3. Plaintiff's expert's assertion of gross negligence.

In *Boyer v. Tilzer*, 831 S.W.2d 695 (Mo. App. E.D. 1992) the court found expert opinion of gross negligence insufficient to create a fact issue. Respondent cites *Ladish v. Gordon*, 879 S.W.2d 623 (Mo. App. 1994) in arguing that plaintiff's expert's conclusion creates a fact issue on gross negligence. *Ladish* explains the foundational requirements that must be present before a *medical* expert may express an opinion as to whether a *doctor* was medically negligent. It doesn't state that expert opinion alone is always sufficient to create a fact issue. It is ironic that plaintiff claims under point I that Golden's duty was so totally prescribed as to leave her no discretion, and yet claims here that an expert opinion is necessary to understand whether she was grossly negligent. Again, whether a jury could find Golden's undisputed conduct so egregious as to be grossly negligent is a question for the court, not plaintiff's expert.

F. Respondent's argument that §190.307 doesn't apply because Golden didn't give "emergency instructions."

Respondent claims the statute doesn't apply because Golden didn't "dispatch the police in an emergency condition, as the responding officer did not even have his emergency lights lit." Because the first subsection of §190.307 clearly applies to Golden, it may not be necessary for the court to decide the meaning of "emergency instructions" in subsection 2. Golden's actions did constitute the giving of emergency instructions. (see Rel. Br. at 33-34). And contrary to respondent's assertion, Golden absolutely treated the situation as an

emergency, dispatching an officer to the scene immediately. Again, it is ironic that respondent here imagines that Golden—earlier described as an entry level clerical employee with no real authority—had the power to direct the responding officer whether or not to activate his emergency lights.

G. Respondent's argument that it is defendant's burden to plead §190.307.

No case has allocated the burden to plead the statute. But it doesn't make sense to describe the statute as an affirmative defense. That is, to require the defendant to plead and prove that she *was not* grossly negligent. Rather it should be read as a requirement of the plaintiff's case, defining the level of conduct necessary to show breach of duty.

Respondent's additional Point IV

Respondent argues that plaintiff is entitled to have a jury decide whether official immunity and public duty apply. That has never been the law in Missouri. This court has always described those rules as offering immunity not just from liability but also from *suit*. See the court's "Conclusion" in *Howenstein*.

The cases cited by respondent offer no support. *Anderson v. Jones,* 902 S.W.2d 889 (Mo. App. 1995) involved a statute that denies immunity for failure to follow traffic rules absent an "emergency situation." The officer claim to have

been pursuing a speeding car was in dispute. No such factual dispute exists here. And in *Lynn v. Time-D.C. Inc.*, 710 S.W.2d 359 (Mo. App. 1986) the court reversed a dismissal because the "skeletal petition" before the court didn't plead any facts related to whether the defendant's duties were discretionary or ministerial.

Which duties are discretionary and which are ministerial is a legal question. When the pleadings make clear that a discretionary duty is involved, this court has sustained dismissal or granted prohibition. When evidence offered in support of a summary judgment motion fully sets forth the defendant's conduct and any rules that prescribe the defendants conduct, the court has sustained summary judgment or granted prohibition. Here, the only possible source of a ministerial duty—the policies and procedures manual—is before the court and Golden's conduct is not in dispute. A jury has no role in determining whether Golden is immune from suit.

Conclusion

This case primarily concerns the interpretation in official immunity in Missouri. Plaintiff has virtually abandoned the argument made to the trial court that §190.307 reduces the common law immunities. Is a city-employed 911 operator—the public's gateway to police, fire, and other emergency services—a public officer? If so, did Golden have discretion—did she have the authority to

decide whether to consult a map or did some rule take that decision away from her? Relator believes she is a public officer, immune from suit.

The court should also hold that she is protected under the public duty doctrine. It should not be the law that each time a 911 operator takes a call she is speaking with—or about—a potential plaintiff. And finally, Golden's undisputed conduct doesn't constitute gross negligence under §190.307.

The court should make the writ permanent.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one paper copy of Relator's Reply Brief, and one electronic copy on disk, were served upon the persons listed below via U.S. Mail, postage prepaid, this 17th day of March, 2005:

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CERTIFICATE UNDER RULE 84.06(c) & (g)

The undersigned hereby certifies that Relator's Reply Brief complies with the limitations contained in Rule 84.06(b), and that the Relator's Reply Brief contains 3808 words. The undersigned further certifies that the computer disk filed herewith has been scanned for viruses and is virus free.

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